(2)

Supreme Court, U.S.
FILED
FEB 11 1999
CLERK

No. 98-1110

In The

Supreme Court of the United States

October Term, 1998

STATE OF NEW MEXICO DEPT. OF PUBLIC SAFETY, DARREN P. WHITE, in his capacity as Secretary of the New Mexico Department of Public Safety, and FRANK TAYLOR, in his capacity as the Chief of the New Mexico State Police,

Petitioners,

vs.

STEPHEN R. WHITTINGTON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

MEMORANDUM FOR RESPONDENTS

TEDDY LOWE HARTLEY*
TEDDY LOWE HARTLEY LTD.
205 Innsdale Terrace
Post Office Box 309
Clovis, NM 88102-0309
(505) 769-2113

RICHARD F. ROWLEY II
JILL HENSON
ROWLEY LAW FIRM, P.C.
305 Pile Street
Post Office Box 790
Clovis, NM 88102-0790
(505) 763-4457

**Counsel of Record for Respondents*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

5 pp

MEMORANDUM FOR RESPONDENTS

The respondents, Stephen R. Whittington, *et al.*, do not oppose the grant of the State of New Mexico Dept. of Public Safety *certiorari* petition in the instant case. The petition (at pp. 1-6) fairly states the procedural history and nature of this case. Respondents do object, however, to Petitioners' interpretation of the New Mexico Court of Appeals' decision and to the nature of the questions presented for review which are detailed below. So as not to burden the Court, we accept the statement, except portions specifically objected to, for present purposes.

We believe that the New Mexico Court of Appeals' decision, finding that state sovereign immunity does not bar suit based upon a federal statute, is entirely correct, both in its basics and in its understanding of this Court's precedents. If that decision stood alone, we would argue against further review by this Court on that ground.

We recognize, however, that the New Mexico decision does not stand alone and that state courts are in conflict across the country on this issue. This Court has obviously recognized such conflict and granted *certiorari* in *Alden v. Maine*, 715 A.2d 172 (Me. 1998). A petition for *writ of certiorari* is also pending in *Jacoby, et al. v. Arkansas Dept. Of Education*, 962 S.W.2d 773 (Ark. 1998) *sub nom. Arkansas Department of Education v. Jacoby, et al.* (No. 98-04). In both of the above cases, along with the present case, state employees brought state court Fair Labor Standards Act overtime pay lawsuits against a State. In *Alden*, the Maine Supreme Judicial Court upheld the State's sovereign immunity claim and dismissed the case. The Arkansas Supreme Court, however, like the New Mexico

Court of Appeals, held that state sovereign immunity was not a bar to such suits.

The Maine, Arkansas, and New Mexico cases all involve the question of the interplay between Congress' Article I legislative powers, state sovereign immunity, the Supremacy Clause of the United States Constitution and the effect of this Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) on the Eleventh Amendment question. The Arkansas and New Mexico decisions are not only in conflict with the Maine decision over their basic outcomes, but also are in conflict over their understanding of this Court's precedents, Congress' Article I powers, and the role of state sovereign immunity in the federal system.

Respondents object to Petitioners' questions presented for review on the basis that they are repetitive and only serve to confuse and muddle the issue. Petitioners' four questions for review can more succinctly be stated as one question similar to that in *Alden* and *Jacoby* – "Whether a state court may refuse to entertain a federal statutory private party cause of action, such as a Fair Labor Standards Act suit, against a State or a state agency on the basis of state sovereign immunity."

We note that, while all three cases involve the same question for review, the *Alden* case presents a second question for review and involves different facts which may furnish a separate basis for decision in that case. The state courts of Maine entertain state statutory actions analogous to the FLSA which creates a second question

for review involving discrimination against federal statutory rights when similar state statutory actions are permitted. New Mexico and Arkansas do not have such state statutory provisions.

Maine and New Mexico also have very different bases for state sovereign immunity. Maine has a rich history of common law sovereign immunity which affords Maine the opportunity to argue that Maine's state sovereign immunity is synonymous with the Eleventh Amendment immunity. Respondents object to Petitioners' continual references in the Petition for *Writ of Certiorari* in this case to "common law" sovereign immunity in New Mexico, as this is not the law of the State.[1] Petitioners further mischaracterize the New Mexico Court of Appeals' decision by stating that the court "did not dispute Petitioners' explication of the State's common law and statutory immunity to unconsented FLSA suit." (*Whittington* Pet. pp. 6-7) A careful reading of the New Mexico Court of Appeals' decision shows that the words "common law" were never used to describe New Mexico's sovereign immunity. While Respondents feel that the common law versus statutory sovereign immunity

---

[1] The New Mexico Supreme Court abolished common law sovereign immunity in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975). While the New Mexico legislature immediately acted to restore much of the State's sovereign immunity by statute, the New Mexico Supreme Court again reinforced that "common law" sovereign immunity, under either meaning of the term common law, was abolished by *Hicks*, leaving only statutory sovereign immunity. *Torrance Co. Mental Health Program, Inc. v. New Mexico Health and Environment Dept.*, 113 N.M. 593, 830 P.2d 145 (1992).

argument is irrelevant to a determination of the issue in this case, Respondents are calling this potential argument by Petitioners to the Court's attention to preserve the objection.

Due to the differences between the present case and *Alden*, the Court may wish to grant *certiorari* in this case and *Jacoby*, and consolidate all three cases for argument and consideration. Hearing all three cases together would allow the Court to consider and resolve all aspects of the issue in one proceeding.

CONCLUSION

In light of the foregoing, Respondents do not oppose a grant of the petition for *writ of certiorari* in this case.

Respectfully submitted,

TEDDY LOWE HARTLEY*
TEDDY LOWE HARTLEY LTD.
205 Innsdale Terrace
Post Office Box 309
Clovis, NM 88102-0309
(505) 769-2113

RICHARD F. ROWLEY II
JILL HENSON
ROWLEY LAW FIRM, P.C.
305 Pile Street
Post Office Box 790
Clovis, NM 88102-0790
(505) 763-4457

**Counsel of Record for Respondents*